2011 IL App (3d) 100519-U

Order filed August 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3--10--0519
v.	)	Circuit No. 07--CF--125
	)	
JASON ATHIALY,	)	
	)	Honorable Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The State put forth sufficient evidence at trial from which a rational trier of fact could reasonably conclude that defendant's actions of touching two children were for the purpose of sexual arousal or gratification, and the trial court did not abuse its discretion by prohibiting impeachment of a witness with someone else's statement.

¶ 2 The State charged defendant, Jason Athialy, with three counts of aggravated criminal

sexual assault (720 ILCS 5/12-16(c)(1)(i) (West 2006)), claiming he committed acts of sexual conduct with victims A.B. and E.B., who were under the age of 13 years old at the time. The first trial in the circuit court of Kankakee County ended with a hung jury. Defendant's second trial resulted in convictions on all counts. This is defendant's direct appeal in which he claims the evidence adduced at trial was insufficient to prove him guilty beyond a reasonable doubt and that the trial court committed reversible error by excluding certain evidence.

¶ 3 FACTS

¶ 4 The bill of indictment alleges that on November 12, 2006, defendant fondled the breast and vagina of A.B., who was under the age of 13. The indictment further claims defendant fondled the vagina of E.B., who was also under the age of 13, on the same date and that defendant was 17 years of age or older at the time of the acts.

¶ 5 The State filed a notice of intent to use hearsay statements at trial. Specifically, the State indicated it intended to call K.B., E.B.'s mother, to the stand to testify to certain statements E.B. made concerning the abuse. The trial court granted the State's motion and the matter proceeded to trial. As noted above, the original trial resulted in a hung jury.

¶ 6 At the second trial of this matter, A.B. testified that she was 15 years old at the time of the trial and 12 years old at the time of the incident. In November of 2006, her family would have what was called "a home group" on Sunday evenings. The home group consisted of Olivet Nazarene students who would come to their house and read the bible and have snacks. The defendant was part of this group.

¶ 7 A.B. described her relationship with defendant as similar to that of any other person, he

did nothing to make her angry and never disciplined her. One night during the home group in November of 2006, she began playing a game on the computer when defendant joined her. Approximately 10 to 15 other students were in the house.

¶ 8 A.B. noted she "was playing. And he told me to get up off the chair, and he pulled the chair back. He told me to sit on his lap." A.B. sat on defendant's lap then continued playing the computer game. A.B. testified that defendant then:

> "*** started scratching my back. And then he moved down to the front and started rubbing my legs, my thigh area.
>
> And then he just kept his right hand on the leg, but then he started moving his left arm towards the private area. And then he just rubbed down there for a little bit, and then he stopped.
>
> And then he started to scratch my back again. Or I tried to get up. And then he kind of just pulled me back down. And so then we played more games, of the same game.
>
> And then he started to scratch my back again, and then he moved around toward the front area and started swirling around my belly button with his finger.
>
> And then he moved up, towards my bra area, just around the strap a little bit. And then - - It was just with his fingers.
>
> And then he kind'a brought up - - It wasn't touching there, but it was kind of half way on. And that was for about five seconds,

and then he got back down."

¶ 9 A.B. continued her testimony by noting that she told defendant she needed to discuss something with her parents, at which time he let her leave his lap. She left defendant's lap, went to the room her parents were in and asked them if she could take a shower. She did not tell her parents about the incident. Instead of taking a shower, she returned to the computer and played more games. Eventually, she did go take a shower and it was after her shower that she told her mother what had happened.

¶ 10 A.B. recalled a conversation she had with E.B. three weeks after the incident in which E.B. told A.B. that defendant would not be "in our home group anymore." During this conversation, E.B. told A.B., "Don't tell mom, but Jason touched me." When asked where defendant touched her, E.B. said, "In the pee." Thereafter, A.B. told the girls' mother about E.B.'s statements.

¶ 11 E.B. testified that she was in the computer room with defendant, Sarah Chelsey and A.B. E.B. was sitting on a chair playing computer games when defendant approached her and told her to get up. She did, defendant sat down and E.B. sat on his lap. E.B. testified that defendant then "put his hand on my leg and moved it upwards, and then he put his hand over my private part." Defendant's hand stayed on her private part for "about ten seconds." E.B. "Tried to get up, but he pushed – pulled me back down."

¶ 12 Walter Webb testified that he works for Olivet Nazarene. He met with E.B. and A.B.'s parents in late November of 2006. He received a copy of a statement prepared by A.B. concerning the allegations against defendant and read a portion of the statement to defendant.

The content of the statement mirrored A.B.'s testimony detailed above. Webb testified that defendant "agreed with the statement and, uh, gave me an affirmation that, uh, what was stated had indeed occurred."

¶ 13 Webb stated that he then asked defendant if the touching was "premeditated, and he said it was not. And I asked him if it was purposeful, and he said that it was."

¶ 14 Webb noted, at trial, that in early December of 2006, he received another statement, this time describing the allegations of E.B. He repeated the same process, asking defendant if the accusations therein were true and defendant again answered in the affirmative.

¶ 15 K.B. and T.B., the victims' parents, both testified at trial. K.B., the victims' mother, discussed her recollections of the home group and what happened after the incident between defendant and A.B. Defendant had been in the home group for approximately 2½ years prior to the incident. K.B. noted A.B. told her about the incident on the night it occurred.

¶ 16 During K.B.'s testimony, the defense sought to admit into evidence a document tiled "Incident Report" which was prepared by reverend Paul Johnson and signed by K.B. The State objected to the admission of the report. The court removed the jury and allowed the defense to make an offer of proof using the report to cross-examine K.B.

¶ 17 During the offer of proof, K.B. identified defense exhibit No. 3 as "Paul Johnson's written statement of what he and I talked about." She acknowledged that she read and signed the document. Without discussing the substance of the document, the court allowed the parties to discuss the admissibility of the document. During these arguments, the State questioned how K.B. could be impeached by "someone else's statement." Defendant responded by claiming the

statement was, in fact, the statement of K.B. as she read and signed the document. The discussion between the court and the parties that followed the offer of proof revealed that Paul Johnson, at the time of trial, no longer resided in the State of Illinois. The trial court offered defense counsel an opportunity to research the matter, noting that it was the court's opinion that to perfect the impeachment of K.B. with statements she allegedly made to Paul Johnson, defendant needed "to have Paul Johnson here." Defense counsel rebuked the court's offer to research the matter.

¶ 18 As the offer of proof continued, defense counsel attempted to identify discrepancies between the facts outlined in the statement and facts from K.B.'s testimony . K.B. testified that others were in the room when A.B. sat on defendant's lap, but the statement reads that A.B. sat on defendant's lap "while no one else was in the room with the computer or within capable sightlines." The document further indicates that defendant used his right hand when making the swirling motion around A.B.'s belly button. K.B. testified that on the night of the incident, she instructed A.B. to show her what exactly where and how defendant touched A.B. During the demonstration, A.B. used her left hand when reenacting the touching in various places.

¶ 19 K.B. continued her testimony during the offer of proof by noting that, again, while she did read and sign the incident report, she had no recollection of telling Paul Johnson that no one else was in the room or discussing which exact hand defendant used when touching her daughter. Considerable argument followed K.B.'s testimony during the offer of proof. Ultimately, the court instructed defense counsel that defendant's exhibit No. 3 could come in to evidence if counsel could perfect his impeachment by calling Paul Johnson to the stand. The State noted that every

subpoena it issued to Paul Johnson was returned and it believed he left the state. Defense counsel indicated that he believed Paul Johnson still lived in the Illinois based on a conversation he had with "College Church."

¶ 20 The offer of proof and argument concerning defense exhibit No. 3 concluded with the trial court informing defense counsel that the document, and its substance, would be admitted into evidence if Paul Johnson appeared in court to perfect the impeachment of K.B. The State agreed to reopen its case-in-chief if that could be accomplished at a later date and the prosecutor guaranteed the court and defendant that K.B. would be available to be called in defense counsel's case-in-chief if need be.

¶ 21 While other witnesses testified during the State's cases-in-chief, none of their testimony is relevant to the issues in this appeal.

¶ 22 Defendant called Alicia McCall as his first witness. McCall testified that she attended the home group on the night in question. There were more than seven students in the group, of which defendant was one. On the evening in question, she did not recall anything unusual happening.

¶ 23 Defendant took the stand in his own defense. On the night in question, he worked with some friends tearing out walls at an office and arrived at the home group at approximately 8 p.m. He witnessed A.B. playing a game on the computer. He sat down and A.B. sat on his lap, which was not unusual. Defendant denied fondling the breast or genital area of A.B. at any time during the evening. Defendant admitted tickling A.B., which again was not unusual. A.B. got up when the computer game ended and defendant did not try to stop her. E.B. never sat on his lap that

evening and he denied ever fondling E.B. in her private parts or crotch area.

¶ 24 Defendant continued his testimony noting that after the evening in question, he received a call from the dean of Olivet Nazarene's office requesting he go there. The director of the school's public safety office was at the dean's office which indicated to defendant that a serious conversation with serious consequences was going to take place. He acknowledged that he admitted to touching A.B. during the meeting, but claimed he only did so after being told that there would be no police involvement or further consequences if he simply admitted that A.B.'s allegations were true.

¶ 25 The case proceeded to closing arguments after which the jury returned guilty verdicts as to all three counts. Defendant filed a motion for a new trial that the trial court denied. This appeal followed.

¶ 26 ANALYSIS

¶ 27 Defendant raises two issues on appeal. Defendant attacks the sufficiency of the State's evidence, claiming the State failed to prove beyond a reasonable doubt that the alleged touchings were for the purpose of his sexual arousal or gratification. Defendant further argues that the trial court committed reversible error by failing to admit defense exhibit No. 3 into evidence and allow impeachment of K.B. with the substance of the document.

¶ 28 A. Sufficiency of the Evidence

¶ 29 When considering issues concerning the sufficiency of the evidence, our standard of review is to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a

reasonable doubt. *People v. Almore*, 241 Ill. 2d 387, 394 (2011). The determination of the weight to be given to the witnesses' testimony, their credibility, and the reasonable inferences to be drawn from the evidence is the responsibility of the fact finder. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 30 Defendant notes that each count of the indictment alleges he fondled the victims "for the purpose of sexual arousal or gratification of the defendant." This language mirrors the elements of the offense of aggravated criminal sexual abuse. Section 12-16(c)(1)(i) of the Criminal Code of 1961 (the Code), under which the State charged defendant, (720 ILCS 5/12-16(c)(1)(i) (West 2006)) prohibits committing an act of sexual conduct with a victim under 13 years of age when the accused is 17 years of age or older. 720 ILCS 5/12-16(c)(1)(i) (West 2006). The Code defines sexual conduct as:

> "any intentional or knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus or breast of the victim or the accused, or any part of the body of a child under 13 years of age *** for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/12-12(e) (West 2006).

¶ 31 Defendant claims the record is devoid of "testimony concerning [his] state of excitement" and, as such, no "reasonable inference of arousal or gratification could be drawn." Defendant acknowledges, however, the litany of cases holding that intent to arouse or satisfy sexual desires may be established by circumstantial evidence and that a trier of fact may consider the

circumstances and facts and infer defendant's intent from his conduct. *People v. Balle*, 234 Ill. App. 3d 804, 813 (1992) (citing *People v. Goebel*, 161 Ill. App. 3d 113 (1987)); see also *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010) ("A defendant's intent to arouse or gratify himself sexually can be inferred solely from the nature of the act."); *People v. Ostrowski*, 394 Ill. App. 3d 82 (2009) (Intent to arouse or satisfy sexual desires may be established by circumstantial evidence, which a trier of fact may consider by inferring defendant's intent from his conduct.); *People v. Bailey*, 311 Ill. App. 3d 265 (2000).

¶ 32 Based upon our review of the record, we believe that there was sufficient evidence adduced at trial to find the defendant guilty of aggravated criminal sexual abuse beyond a reasonable doubt. The victims clearly and unequivocally testified that the conduct did, in fact, take place. Testimony of a single witness is sufficient to convict if the testimony is positive and credible, notwithstanding the fact that the testimony was contradicted by the accused. *Id.* at 269 (citing *People v. Daily*, 41 Ill. 2d 116 (1968)).

¶ 33 Certainly the mere act of an adult rubbing the genital area and breast of a 12-year-old girl, and the genital area of an 11-year-old girl, supports the inference that those acts were done for the purpose of sexual gratification or arousal. Again, an accused's intent can be inferred solely from the nature of the act itself. *Burton*, 398 Ill. App. 3d at 315. Other evidence adduced at trial supports that inference as well.

¶ 34 After originally being touched in her genital area, A.B. tried to escape defendant but he pulled her back down and then moved the touching to her breast area. A.B. testified the touching lasted "for about five seconds." E.B.'s testimony indicated that defendant's hand stayed on her

"private parts" for "about ten seconds" and that she too tried to escape but defendant pulled her back down. These descriptions of the events do not evince a glancing blow to a sex organ during a tickle-fest or innocent and naive conduct. Certainly the length of the contact and circumstances surrounding the contact support the inference that it was done knowingly for the purposes of sexual gratification.

¶ 35 Moreover, Mr. Webb testified that defendant, after admitting to the touchings, acknowledged that the conduct was "purposeful." While defendant's testimony provides a purported excuse as to why he admitted to the conduct, it was for the trier of fact to determine whether defendant's testimony is believable. Our task is not to quarrel with the jury's determinations of credibility, but to simply decide whether the State put forth sufficient evidence at trial from which any rational jury could find the inference that defendant's conduct was intended for the purpose of sexual arousal or gratification. We find the State did put forth sufficient evidence from which a rational trier of fact could make such a finding.

¶ 36 B. Evidentiary Rulings

¶ 37 Defendant's second claim on appeal is that the trial court committed reversible error by not admitting defense exhibit No. 3 and allowing him to cross-examine K.B. with the document. Evidentiary rulings are within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v. Wheeler*, 226 Ill. 2d 92 (2007). A trial court abuses its discretion when making an evidentiary ruling if its decision is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.* at 133.

¶ 38 The trial judge found that the defense exhibit No. 3 to be the statement of, and authored by, Paul Johnson and not K.B. The court acknowledged the content of the writing memorialized a discussion between the two and that K.B. indicated she read and signed the document. Nevertheless, the trial court found the statement was not K.B.'s statement, but instead Paul Johnson's statement. Defendant takes issue with this finding claiming the writing is evidence of a prior inconsistent statement made by K.B. and, as such, it should have been admitted pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10.1 (West 2006).

¶ 39 The State acknowledges that section 115-10.1 allows for admission of a prior inconsistent statements. The State correctly notes, however, that it has long been settled that one cannot be impeached with the written statement of another. In *People v. Lucas*, 132 Ill. 2d 399 (1989), our supreme court found that attempting to impeach a witness "with a written statement of [another] was improper." *Id.* at 430.

¶ 40 Defendant seemingly acknowledges that the document is the statement of Paul Johnson as he claims, "It was her statement as well as that of Paul Johnson." However, defendant cites no authority to support the proposition that such a writing can be the statement of two people for purposes of impeachment. Assuming, *arguendo*, that such a writing can evince the statement of multiple parties for impeachment purposes, it would still not have been admissible under section 115-10.1. 725 ILCS 5/115-10.1 (West 2006).

¶ 41 In *People v. Leonard*, 391 Ill. App. 3d 926 (2009), this court noted that a prior inconsistent statement, under section 115-10.1, "is only admissible as an exception to the hearsay rule *** [when] the witness either acknowledges under oath that he made the statement or it is

established that the statement was accurately recorded." *Id.* at 934. Neither instance is present in this case.

¶ 42 Defendant acknowledged below that he intended to use the writing to accentuate two discrepancies between it and K.B.'s testimony. K.B. testified that others were in the room in which defendant had A.B. and E.B. sitting on his lap. The writing notes the acts took place "while no one else was in the room with the computer or within capable sightlines." Furthermore, the writing indicates A.B. used her right hand to reenact the touchings while K.B. testified that A.B. told her defendant used his left hand.

¶ 43 At trial, K.B. testified that she had no recollection of discussing with Paul Johnson the specifics of who was, or was not, in the room when the touchings took place or exactly which hand defendant used when touching A.B. K.B. neither acknowledged making the statements defendant intended to use to impeach her nor acknowledged that her words were accurately recorded. The trial court specifically discussed this fact with defense counsel and did an excellent job when explaining its ruling to deny admission of the document unless defendant intended to call Paul Johnson to the stand to testify that K.B. did, in fact, make statements inconsistent with her testimony.

¶ 44 When explaining its ruling, the trial court analogized the matter to a situation that plays out daily in our many criminal courts throughout the state: that is, where the accused signs a statement/document prepared by a police officer which memorializes their conversation, then eventually testifies at trial that the document does not accurately recite the facts which the accused relayed to the officer. The trial court noted in that situation, just as in this one, there are

two paths to perfect impeachment.

¶ 45 The trial court explained that in the first instance, impeachment can be perfected if the witness admits making the prior inconsistent statement. In such an instance, there would be no need to call the officer that prepared the statement as the accused, himself, acknowledged making the statement which is inconsistent with his trial testimony.

¶ 46 The trial court noted that if, however, the witness has no recollection of making the statement or specifically denies making the statements contained within the writing, claiming for instance that the officer incorrectly memorialized defendant's words even though defendant signed the writing, then the party seeking to admit the statement must produce the officer to testify that the accused actually made the prior inconsistent statements contained within the writing.

¶ 47 We find the trial court's analogy and recitation of the paths through which defendant could have properly sought admission of defense exhibit No. 3 accurate. Again, as this court noted in *Leonard*, a prior inconsistent statement may be admitted when the witness either acknowledges under oath that he made the statement or it is established that the statement was accurately recorded. *Id.* at 934. Defendant accomplished neither task in this matter and, as such, we find the trial court did not abuse its discretion in refusing to admit defense exhibit No. 3.

¶ 48 Finally, defendant argues the trial court committed reversible error during "the testimony of Jason Athialy." Defendant argues that the trial court failed to properly apply the completeness doctrine when refusing to allow defendant to testify to statements made by the director of security, Craig Bishop, during his meeting with Dean Webb. Specifically, defendant claims he

"wanted to testify as to what he was told during this conversation to show why he admitted to doing certain things. *** [N]ot allowing the defendant to testify to what really was said to him was error."

¶ 49 The record indicates that as defense counsel attempted to question defendant regarding Bishop's statements, the State objected arguing any potential testimony given by defendant would constitute impermissible hearsay. Defense counsel disagreed, making two arguments as to why defendant should be allowed to testify as to what Bishop said during the meeting. Counsel originally argued he was not offering the testimony to prove the truth of the matter asserted, but instead for its effect on defendant's state of mind. Counsel also argued that the completeness doctrine allowed for admission of the statements given the amount of testimony the State introduced concerning the conversation between Dean Webb, Bishop and defendant.

¶ 50 On appeal, defendant cites to *People v. Weaver*, 92 Ill. 2d 545 (1982), as authority for the proposition that the trial court failed to properly apply the completeness doctrine on this issue. Nowhere in his initial brief or reply brief does he reiterate the "state of mind" argument made below. As such, we find defendant has forfeited that argument. See *People v. Jacobs*, 405 Ill. App. 3d 210 (2010).

¶ 51 Moreover, we also find defendant has forfeited his claim that the trial court erred when holding Bishop's statements to which defendant would have allegedly testified were inadmissible. As noted by our supreme court in *People v. Peeples*, 155 Ill. 2d 422 (1993):

> "When a trial court refuses evidence, no appealable issue remains unless a formal offer of proof is made. [Citation.] The

> purpose of an offer of proof is to inform the trial court, opposing counsel, and a reviewing court of the nature and substance of the evidence sought to be introduced. [Citations.] Where it is not clear what a witness would say, or what his basis would be for saying it, the offer of proof must be considerably detailed and specific. A reviewing court can thereby know what was excluded and determine whether the exclusion was proper. [Citations.] 'The failure to make an adequate offer of proof results in a waiver of the issue on appeal.' " *Id.* at 457-58 (quoting *People v. Andrews*, 146 Ill. 2d 413, 421 (1992)); see also *People v. Beaty*, 377 Ill. App. 3d 861 (2007).

¶ 52 We simply do not know, as defendant made no offer of proof, what defendant would have testified to regarding statements allegedly made by Bishop during the meeting. We have carefully reviewed the record in this regard. While the jury was sent out while the court discussed this issue at length with counsel, no offer of proof was made. Rather, it clearly appears that all involved agreed to what defendant would testify about once the jury returned. Without a greater understanding of the substance and content of those purported statements, we cannot say the trial court erred in precluding defendant's testimony. That is, we do not know what evidence was banned. The absence of an offer of proof prevents us from knowing what was excluded and determining whether the exclusion was proper.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 55 Affirmed.